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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

Appellant's Brief In Opposition To Motion To Dismiss Or Affirm

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PRELIMINARY STATEMENT

Appellee's contention, (page 2 of motion) that this appeal should be dismissed because appellant did not docket the case within 90 days after the judgment appealed from, as prescribed by Rule 13 of the revised rules of this Court, is without merit. Under this Court's rules timely docketing is not jurisdictional. *United Public Workers v. Mitchell,* 330 U.S. 75, 84-86[1] (1945). This appeal was docketed on

1. The Court said, 330 U.S. at 86: "It will not expedite determination of constitutional questions to dismiss appeals because of errors of practice."

February 17, 1969, 55 days after the December 24, 1968 limit set forth in the rules, as revised effective October 2, 1967. The filing was thus within the 60 day extension period subsequent to December 24, 1968, which a justice of this Court might have granted for good cause shown under revised Rules 13 and 34, provided appellant had made application prior to December 24, 1968. Furthermore, the case was timely docketed under Rule 13, as it existed prior to the 1967 revision, since it was docketed within 60 days of the filing of the notice of appeal on December 20, 1968. Appellee in no wise alleges any prejudice or hardship which has resulted to it, because of this inadvertent delay. Finally, in any event, the matter has been rendered moot by the timely docketing on March 13, 1969 of appellant's companion appeal from the federal district court for the northern district of California in No. 1152, *Southern Pacific Company v. Public Utilities Commission of the State of California, et al.*, which raises the identical two constitutional issues raised in the present appeal, along with others.

ARGUMENT

I. Appellant's Contention That the Granting to the California Public Utilities Commission of Power to Punish for Contempt Violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution Raises a Novel and Substantial Federal Question.

Appellee's motion to dismiss does not dispute the novelty of this question, and, we submit, it does not establish that it is without substance.

Our contention that this issue does present a substantial federal question is two-fold in nature. First, we contend that since this Court in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 485 (1894), has recognized that the due process requirements of the Fifth Amendment are

violated when a federal administrative agency is delegated power to punish for contempt, and since it is settled that, in general, the Fourteenth Amendment carries the same limitations on arbitrary state actions which the Fifth Amendment imposes with respect to federal action (*Hibben v. Smith,* 191 U.S. 310, 325 (1903)), therefore, the Fourteenth Amendment precludes a state from delegating to one of its administrative bodies the power to punish for contempt. Secondly, we assert that since this Court's decision last year in *Bloom v. Illinois,* 391 U.S. 194, 20 L.Ed. 2d 522 (1968) holds that in serious state criminal contempt cases the due process clause of the Fourteenth Amendment requires that all established fundamental protections of our judicial system, and particularly the right of trial by jury, must be accorded, and since the right of trial before a court, even in petty criminal cases, is even more fundamental than the right of trial by jury, therefore, granting of power to an administrative body rather than a court to try such a case is a violation of the due process clause of the Fourteenth Amendment for this further reason.

For purposes of our first contention, appellee's major argument throughout its motion that the instant administrative proceedings involved civil rather than criminal contempt, which we shall point out is completely erroneous, is, in any event, entirely immaterial. This is because the language in *Brimson,* on which we rely as establishing that due process prohibits granting to a federal administrative body the power to punish for contempt, clearly indicates that the Court was referring to civil contempt proceedings. The pertinent quotation from *Brimson* (154 U.S. at 485), is as follows:

> "Such a body [a federal administrative agency] could not, under our system of government, and con-

> sistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

Since the Court spoke of contempt "to compel obedience to its orders" it definitely had in mind contempt for remedial, instead of penal, purposes. It is apparent too from the decision in that case that the Court was concerned with remedial, rather than punitive, proceedings. Thus, the decision actually held that a federal court could constitutionally be directed by the Interstate Commerce Act to entertain a petition of the Interstate Commerce Commission, to compel a recalcitrant witness before the Commission to produce documents relating to a matter under investigation by the Commission, even though, as indicated in the quoted excerpt, contempt powers could not constitutionally have been conferred upon the Commission. In view of this, by appellee's own description of the major distinction between civil and criminal contempt proceedings, it is evident that the Court in *Brimson* was really stating that civil contempt powers could not constitutionally be granted to a federal administrative commission. Thus, appellee in its motion (p. 10), in correctly paraphrasing the established distinction between the two types of contempt proceedings recognized in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911), states:

> "If the purpose is *remedial*, the proceeding is one for civil contempt, while if the purpose is *punitive* the contempt is criminal."

We submit that *Brimson* must be accepted as even stronger authority for the proposition that power to punish for criminal contempt cannot constitutionally be vested in a federal administrative body.

Appellee's statement (pg. 1) that at the federal level administrative bodies may properly be given *de facto* contempt powers does not mean that they have the power to punish for contempt, as appellee recognizes, when it adds (pg. 7) ". . . though the form of enforcement (obtaining a court order) makes enforcement appear to be outside of the agency's power." The established statutory pattern in the federal field, is to follow the division of power approved in *Brimson*, as described in *National Labor Relations Board v. Warren Co.*, 350 U.S. 107, 112-113, cited by appellee (pg. 7) of granting the administrative body power to issue a substantive order in its field and granting the federal courts power to enforce it by the judicial remedy of contempt. Here, we are concerned only with the power of enforcement by contempt proceedings of orders of state administrative bodies. California chose to confer this power upon the same administrative agency which made the involved order, the Public Utilities Commission of California, rather than upon its courts. We submit that due process requires *a fortiori* that the states must be confined to the same pattern as the federal government, and that accordingly California's departure from that pattern is unconstitutional.

The only two cases cited by appellee (pg. 8) in opposition to our contention that delegation of contempt powers to the Commission was unconstitutional are not pertinent, because they do not deal with the validity under the Fourteenth Amendment of conferring contempt powers upon a state administrative agency. *Consolidated Rendering Company v. Vermont*, 207 U.S. 541 (1908) merely sustained the validity of a contempt fine imposed by a state court for failure to provide certain papers to a grand jury. *Carfer v. Caldwell*, 200 U.S. 293 (1906) merely upheld a state law conferring power upon a committee of the state legislature to compel attendance of a witness before it.

Appellee cites these cases for the proposition that the due process clause of the Fourteenth Amendment does not compel states to observe the doctrine of separation of powers applicable to the federal government and accordingly does not prevent a state from conferring upon non-judicial agencies certain functions that may be called judicial. We think it is clear, however, that while this Court in the quoted excerpt from *Brimson* had in mind to some extent the doctrine of separation of powers as a reason for denying the validity of granting contempt powers to a federal administrative body, it also definitely indicated that such delegation was further proscribed by other and independent aspects of due process of law. Thus, this Court in that excerpt stated that such delegation could not validly be done "under our system of government," which apparently referred to the doctrine of separation of powers, but also "consistently with due process of law." In any event, *Bloom v. Illinois* now establishes that serious criminal contempt proceedings must be accorded all the protections embraced within the concept of "due process of law", including jury trial, as part of "all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice." (20 L.Ed. 2d at 533) Certainly the right to trial before a court rather than a commission in such a case is even more fundamental than the right to trial by jury. This was implicitly recognized in *Bloom*, since the Court stated (20 L.Ed 2d at 531), citing *In Re Oliver*, 333 U.S. 257 (1948):

> "It has also been recognized that the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge."[2]

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2. The bias which appellant contends was exhibited in this contempt proceeding and not subjected to appropriate independent judicial review is raised in our companion appeal in No. 1152.

In the cited *Oliver* case this Court declared, 333 U.S. at 278:

> "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."

Appellee's emphasis (pg. 8) of the fact that the Commission derives its contempt powers not only from the statutes of California but also from the constitution of this state is completely without avail, since the issue here is not one of separation of powers but instead of due process. It is settled that the federal constitutional due process clause is paramount even to California constitutional provisions, *Reitman v. Mulkey*, 387 U.S. 369 (1967). Appellee, in fact, admits this when it states (pg. 8):

> "Absent a clear violation of due process of law . . . these powers, including the contempt power, may be exercised by the Commission."

II. Appellant's Contention That the Legislative Failure to Provide Jury Trial in a Serious Criminal Contempt Proceeding Further Violated the Due Process Requirements of the Fourteenth Amendment Also Raises a Novel and Substantial Issue.

In this connection we assert that since *Bloom v. Illinois* holds that due process under the Fourteenth Amendment requires a jury trial in non-petty criminal contempt proceedings before a state court, *a fortiori*, it requires that a state provide for the right to jury trial where it permits one of its administrative bodies to act as judge in such type matters. Appellee observes (pg. 9) that, the *Bloom* case, on which we here rely, does not discuss the right to a jury trial as being applicable to an administrative agency. That, of course, is obvious, since such a matter was not before the Court in that case. However, such situation, coupled with the fact that appellee cites not a single case

as having heretofore dealt with this specific basic question, merely illustrates the novelty of the issue.

In order for this issue also to be substantial we, admittedly, must establish reasonable grounds for the conclusion that the present proceedings involved both criminal, rather than civil, contempt and also a non-petty matter within the scope of *Bloom*. This we shall now proceed to do.

Appellee devotes its entire defense on this issue to arguing that the instant proceedings involved civil and not criminal contempt (pp. 10-12). It should be observed, at the outset, that the impression which appellee attempts to convey (pp. 5-6, 12-13), that the California Supreme Court, in denying a writ of review in this case, actually held that this was a civil contempt matter and thus adjudged the case on non-federal grounds, is patently untrue. From the laconic post card notice order which it issued, "Petition for writ of review denied"[3] no one can tell on what grounds it decided the case.

Appellee cites certain federal cases[4] for the general proposition that there is a distinction between criminal and civil contempt. Accepting that general proposition, however, a review of those cases indicates that under them appellant's contempt conviction can only be described as criminal, and not civil, in nature.

These cases do recognize the distinction but also describe the standards for determination whether a contempt is

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3. The failure of the California Supreme Court to provide independent judicial review of the Commission's record on important issues of procedural due process is attacked in our companion appeal in No. 1152.

4. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, (1911); *United States v. United Mine Workers*, 330 U.S. 258 (1947); *McCrone v. United States*, 307 U.S. 61 (1939); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.* (C.A. D.C., 1967), 380 F.2d 570; *Parker v. United States*, (C.A. 1, 1946), 153 F.2d 66

criminal or civil in nature. Those standards or distinctions are as follows:

1. A civil contempt action is brought by the party economically injured by the contumacious act while a criminal contempt action is brought on behalf of the tribunal or governmental entity whose order was disobeyed.

2. A civil contempt action is part of the original action between the private parties while a criminal contempt proceeding is a separate and distinct action.

3. The purpose of a civil contempt proceeding is purely remedial and is to make reparation to a complainant injured by the contumacious act. Additionally, its purpose is to coerce obedience to a decree issued in complainant's favor or to compensate complainant for a loss caused by the act. As a result, the fine is payable to the complainant rather than to the tribunal. Such fine cannot exceed the actual loss incurred by the complainant if it is to be considered a civil proceeding. On the other hand, a criminal contempt conviction is "after the fact" punishment to vindicate the authority of the tribunal and deter future offenses. The fine is generally payable to the tribunal not the injured party. However, such a fine does not lose its punitive character even though a portion is directed to be paid to a private party injured by the contumacious act. *Parker v. United States*, (C.A. 1, 1946) 153 F.2d 66, 70.

4. The mere fact that the punishment is by fine with no imprisonment does not prevent a contempt conviction from being punitive and criminal in nature.

5. In civil contempt, the punishment is for refusing to do an act commanded which is remedied by punishment until the party performs the required act. Criminal contempt is for a past act and the punishment cannot be avoided by subsequent obedience to the tribunal.

Judged by such federal standards, the conviction of appellant for contempt of the Commission was clearly punitive in nature and not coercive or remedial. (1) The contempt action was instituted by the Commission on an affidavit of a Commission employee and not by an individual parking patron. (2) The contempt proceeding was separate and apart from the substantive case involving appellant's parking lot charges, even though given the same case number. (3) The contempt action, instituted on November 15, 1967, was for certain specifically described past violations of Commission orders. Thus it was to punish for past violations and was not remedial or coercive in order to terminate present violations. (4) The fine of $22,000 was absolute by its own terms and obligated appellant to the extent of $22,000. There was no evidence in the proceeding as to the actual losses suffered by individual parking patrons and the fine was not based upon any evidence of these charges collected by appellant. The mere fact that appellant was to be given credit towards the fine for any refunds made does not cause the fine to be considered remedial or coercive. (*Parker v. United States, supra*, pg. 70). (5) Appellant could not avoid the fine by cessation of charges because the fine was levied for past rather than present violations of the Commission's order. It is obvious that the imposition of the $22,000 fine could not remedy the alleged historical fact that appellant had not fully complied with the Commission order.

Any determination by the California courts as to the nature of these contempt proceedings is, of course, not binding upon this Court. Thus, in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954) and *Napue v. Illinois*, 360 U.S. 264, 272 (1959), this Court referred to

> ". . . the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

Nevertheless, the California courts[5] have recognized the same common law distinctions between criminal and civil contempt, the former being "directed primarily to the maintenance of the dignity and authority of the court," and the latter having the "primary object [of] the protection of the private rights of the parties litigant." *In Re Morris*, 194 Cal. 63, 66 (1924). Appellee's statement (p. 11) that the *Morris* case and *In Re Bruns*, 15 Cal. App.2d 1 (1936) held that merely because a contempt proceeding was brought under the Code of Civil Procedure, as this was, is patently erroneous. In the former case, the California Supreme Court said (194 Cal. 63 at 67):

> "Both of these classes of contempts are contemplated by and provided for in the provisions of our Code of Civil Procedure, above cited, and are to be investigated and punished in the same manner and in accordance with the same rules."

While appellee in its motion does not contend to the contrary, it is plain that this proceeding involved a serious and non-petty offense. Here, we submit the fine imposed, $22,000, was sufficiently substantial to bring the case out

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5. It is difficult to find in California law a more settled proposition than that contempt proceedings are criminal in nature, whether or not they are brought pursuant to applicable provisions of the California Code of Civil Procedure. *Foust v. Foust*, 47 Cal. 2d 121, 302 P.2d 11 (1956); *City of Culver City v. Superior Court*, 38 Cal. 2d 535, 241 P.2d 258 (1952); *Phillips v. Superior Court*, 22 Cal. 2d 256, 137 P.2d 838 (1943); *Hotaling v. Superior Court*, 191 Cal. 501, 217 Pac. 73 (1923); *In re Wren*, 48 Cal. 2d 159, 308 P.2d 329 (1957); *In re Mancini*, 215 Cal. App. 2d 57 (1963); *In re Gould*, 195 Cal. App. 2d 172 (1961); *Butler v. Superior Court*, 178 Cal. App. 2d 763 (1960).

of the petty offense category. Although the $500 fine permitted by § 1218, California Code of Civil Procedure, for a contempt is perhaps not substantial on its face, the California Supreme Court approved the arbitrary construction placed by the Commission on that section as permitting it to consider that it was not faced with what was in reality at most but a single act of contempt, refusal to obey the Commission's order, but rather with 44 separate acts of contempt, selected chargings of the involved parking fee to various motorists. In this fashion, by multiplying $500 by 44, the Commission, arrived at the very substantial $22,000 fine. On the same theory, since the same parking fee was assessed by appellant against hundreds of other motorists during this period, the Commission could have with impunity just as well have assessed a tremendous fine and imprisoned officers of appellant for five days for each individual car as to which a parking fee was collected.

There remains only appellee's contention, page 6, that the jury trial requirements of the *Bloom* case cannot, in any event, be made applicable here because in *De Stefano v. Woods*, 392 U.S. 631 (1968) the Court indicated that such requirement would not be enforced as to trials begun prior to May 20, 1968, and in this case the proceeding began before that date. It is apparent, however, that the reasons given in the *De Stefano* case for only prospective application of this doctrine are not applicable here. Such action was taken because it was recognized there that the *Bloom* case was overruling a long-established line of precedents and because of the possible adverse effects on the administration of justice. Here, in contrast the matter is one of first impression and following of the *De Stefano* rule will not jeopardize the administration of justice.

CONCLUSION

Since both of the issues raised by this appeal are clearly novel and substantial the Court should note jurisdiction and set the case for formal argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT L. PIERCE, one of the attorneys for SOUTHERN PACIFIC COMPANY, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 25th day of March, 1969, I served a copy of the foregoing Brief in Opposition to Motion to Dismiss or Affirm as follows:

On all counsel of record for the CALIFORNIA PUBLIC UTILITIES COMMISSION, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to said counsel at their post office address, 5072 State Building, San Francisco, California 94102.

Dated at San Francisco, California, this 25th day of March, 1969.

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